

Hon. Marc Barreca  
Chapter 7  
Hearing Date: March 4, 2021  
Hearing Time: 9:30 a.m.  
Hearing Location: Telephonic  
Response Date: March 4, 2021

**UNITED STATES BANKRUPTCY COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON**

**In Re:**

**CASE NO. 14-17526-MLB**

**GARTH A. MACLEOD,**

**Chapter 7**

**Debtor,**

**ADVERSARY No. 18-01149-MLB**

**EDMOND J. WOOD, solely in his  
capacity as the chapter 7 trustee of the  
bankruptcy estate of GARTH A.  
MacLEOD,**

**PLAINTIFF'S SUR-REPLY  
RE: DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT [Dkt. 46]  
AND REPLY [Dkt. 49]**

**Plaintiff,**

**vs.**

**JONATHAN SMITH, P.S., a Washington  
professional services corporation d/b/a  
ADVANTAGE LEGAL GROUP, and  
JONATHAN SMITH, an individual,**

**Defendants.**

Plaintiff files this short sur-reply to dispute two fundamental errors in  
Defendants' motion and reply.

**A. Messrs Wood and Groshong Are Not "Experts" Subject to Expert**

Plaintiff's Sur-Reply  
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1           **Witness Disclosure under FRCP 26(a)(2).**

2           The premise of Defendants' motion to exclude is mistaken. A witness who is  
3 not testifying as a retained expert may express opinions "rationally based on the  
4 witness' perception [if]. . .helpful to clearly to. . .determining a fact in issue." ER 701  
5 (in pertinent part). Proximate cause constitutes an issue of fact. A sharp distinction  
6 exists between a "retained expert" who is specially employed for purposes of  
7 developing and expressing professional opinions in litigation, as distinguished from a  
8 percipient fact witness who testifies based on his/her first-hand knowledge. See, e.g.,  
9 *Klausman v. CSK Auto Inc.*, 2008 WL 5504709 \*4 (W.D. Wash. 04/09/2008)("By the  
10 Rule's plain terms, whether a written report is required as part of an expert witness  
11 disclosure turns on whether the witness was "retained or specially employed to provide  
12 expert testimony in the case," not on the content of the proposed testimony. Fed. R. Civ.  
13 P. 26(a)(2)(B).") Indeed, Plaintiff alerted the defense to that distinction as early as  
14 Plaintiff's initial discovery responses in November 19, 2019.<sup>1</sup>

15  
16  
17  
18 <sup>1</sup> Plaintiff's Answer to Interrogatory no. 6 related to expert witnesses:

19           **ANSWER:** Plaintiff intends to provide the requested information in conformity with  
20 the Notice of Trial and Order Setting Deadlines.

21           Out of an abundance of caution, **Plaintiff notes that certain of the percipient fact**  
22 **witnesses listed in Plaintiffs' Answer to Interrogatory No. 2 may express**  
23 **opinions within their respective areas of practice, even though they are not**  
24 **retained experts and, therefore, not subject to expert witness disclosure**  
25 **requirements.** See, e.g., *MKB Constructors v. Am. Zurich Ins. Co.*, 83 F. Supp.3d  
1078, 1093 (W.D. Wash. 2015). *Paiya v. Dunham Const. Co.*, 69 Wn. App. 578, 849  
P.2d 660 (1993); *Baird v. Larson*, 59 Wn. App. 715, 801 P.2d 247 (1990);

1 Here, neither the Trustee (Mr. Wood) nor his attorney (Mr. Groshong) are acting  
2 as a retained expert but are instead testifying as percipient fact witnesses under ER 701.

3 **B. Because FRCP 26(a) Does Not Apply, Refusing to Consider the**  
4 **Wood and Groshong Declarations Would Constitute Error.**

5 Plaintiff provided the defense with damage estimates in both discovery and in  
6 connection with Defendants' prior summary judgment motion. In a similar situation in  
7 which FRCP 26(a) also did *not* apply, *Naxos v. American Family Ins. Co.*, 2020 WL  
8 106740 \*5 (W.D. Wash. 01/09/2020) held "the court need not consider whether Naxos  
9 carried its burden to show that its failure to disclose was harmless or justified." Instead,  
10 the moving party had to show that the late disclosure made it "impossible" to complete  
11 damages discovery prior to trial. *Id.* Accord, *Focal Point Films, LLC v. Sandhu*, 2020  
12 WL 5760355 \*3 (N.D. Cal.). No such showing has been made here.

13  
14 **IV. CONCLUSION**

15 The Court should therefore grant Plaintiff's Motion for Leave to File a Sur-  
16 Reply on shortened time and without additional notice.

17 Dated: March 3, 2021.

18  
19 WAID LAW OFFICE, PLLC

20 BY: /s/ Brian J. Waid  
21 BRIAN J. WAID  
22 WSBA No. 26038  
23 Attorney for Plaintiff

24  
25 Plaintiff's Sur-Reply  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day March 2021, I caused a copy of the foregoing pleading to be delivered to all counsel of record via the Court's ECF delivery system.

Dated: March 3, 2021.

WAID LAW OFFICE, PLLC

BY: /s/ Brian J. Waid  
BRIAN J. WAID  
WSBA No. 26038  
Attorney for Plaintiff

Plaintiff's Sur-Reply  
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